82-673

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ALEXANDER L. STEVAS,
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Gary Gianni,
Petitioner,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

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THE QUESTION PRESENTED

Whether the conduct of Drug Enforcement Administration agents in instigating a drug transaction and supplying the controlled substance to the Petitioner constituted outrageous conduct and a denial of Due Process.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeal is reported at 678 F.2d 956 (Appendix A). The opinion of the district court is not reported.

JURISDICTION

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on June 14, 1982. A timely petition for rehearing was denied on August 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part.

"No person shall ****be deprived of life, liberty, or property without due process of law****."

STATEMENT OF THE CASE

Petitioner was found guilty by The Honorable Richard B. Kellam, in the United States District Court for the Middle District of Florida, of conspiracy with intent to distribute marijuana, in violation of Title 21 United States Code Sections 841(a)(1) and 846. A one year sentence of incarceration was imposed. The question presented for review in this Petition arises out of the United States Court of Appeals for the Eleventh Circuit's failure to overturn Petitioner's conviction. Petitioner argues before this Court that his conviction was obtained by outrageous government conduct, violative of his right to Due Process of Law.

In the summer of 1980 the Drug Enforcement Administration (DEA) instituted an undercover operation entitled "Operation Doublecross". Approved by the United States Department of Justice, the operation involved the undercover sale of marijuana by DEA agents.

Pursuant to the guidelines of Operation Doublecross, DEA Agent Fagan contacted Kenneth Craig and requested Robert Karley's telephone number. The agent had met Craig and Karley approximatley one year before during the course of an undercover DEA operation.

In seperate telephone calls, Agent Fagan informed the two that he had a large quantity of marijuana for sale. After a series of conversations a meeting was arranged between the agent and the two men at a Holiday Inn in Seminole County, Florida. The undercover agents agreed to

sell marijuana for $245.00 per pound. To effectuate the transaction the agents would receive keys to various automobiles from Karley and Craig and then load the cars at an unknown location. Upon the return of the loaded cars by the undercover agents an exchange of keys for money would take place.

During one of the meetings, the undercover agents met David Wainer. Wainer indicated that he had buyers at the Holiday Inn, but he only wanted to purchase a hundred pounds of marijuana. The agents refused his offer and insisted that they had a thousand pound limit. After additional negotiations, Wainer agreed to deal with the undercover agents the following day.

The following morning the agents loaded three vehicles with 390 pounds of marijuana and returned them to the Holiday

Inn's parking lot. An exchange of keys and money was made between the agents and Wainer. After the vehicles left the parking lot their occupants were arrested.

Later that same day a second transaction was arranged in which 760 pounds of marijuana was transferred in the same fashion. The Petitioner was arrested while operating a car loaded with marijuana in the second transaction.

Prior to trial the Petitioner filed a Motion to Dismiss Indictment based on a denial of his due process right. This motion was denied by Judge Kellum.

The Petitioner made a timely appeal of his conviction and the denial of his Motion to Dismiss to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed Petitioner's conviction on June 14, 1982. See Appendix A.

REASONS FOR GRANTING THE WRIT

This Petition raises a substantial and important question concerning the permissible level of government involvement in criminal activity. The decision of the Court of Appeals, if allowed to stand, will in effect create a situation where the Government will be promoting rather than detecting crime.

The Eleventh Circuit, in holding that the conduct of the DEA did not constitute a denial of the Petitioner's right of Due Process, relied on this Court's rulings in Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973). In Hampton v. United States, 425 U.S. 484 (1976), this Court stated that it is not necessarily misconduct for government agents, while investigating criminal activity, to supply or sell illegal drugs or provide other

essential services. 425 U.S. at 489. United States v. Russell, 411 U.S. 423 (1973) recognized that the Government's infiltration of criminal activity is a permissible means of law enforcement. 411 U.S. at 432.

Here, the Court is present with a factual scenerio which is divergent from the two earlier cases. The case before the Court is an example of the type of conduct condemned in United States v. Russell, 411 U.S. 432, 431-32 (1973):

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction...

The conduct of the DEA can neither be characterized as the mere infiltration of a drug orgainization nor simply the sale of an illegal drug. The criminal

activity, in this case, could not have proceeded to fruitation as in United States v. Russell, 411 U.S. 423 (1973) without the aid of the Government. Agents of the Government used their resources to create a crime rather than to detect one in progress. The facts before the lower court establish that DEA undercover agents controlled every aspect of the criminal transaction from start to finish as in United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). In Twigg, a conviction was reversed due to outrageous conduct displayed by the Government agents.

Contrary to Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973) the Petitioner's predisposition was not a factor. While there existed evidence to show predisposition on the part of Karley, Craig and Wainer to commit the crime, the

record is devoid of any predisposition on the part of the Petitioner. At trial, the Government did not offer proof that the Petitioner was involved in unlawful drug trafficking transactions with Craig, Karley or Wainer prior to the Government's instigation of the crime for which he was convicted.

In Hampton v. United States, 425 U.S. 484 (1976) the defendant, a known drug user, was convicted on the subsequent sale of Government supplied contraband and not for possession. The fact of the sale indicates a criminal intent beyond that which is required for possession and the defendant in Hampton, admitted predisposition on his part. He acknowledged the fact that he had solicited the drug sale to make money. The incident was part of ongoing criminal activity. In this case,

the Petitioner did not claim entrapment and lack of predisposition because he did not have contact with Government agents.

Justice Powell at 425 U.S. 495 f.n. 7 stated that the cases, if any, in which proof of predisposition by the Government is not dispositive will be rare, and in this case, there is no proof of Petitioner's predisposition by the Government.

Considering, the egregious conduct of the DEA in this case, it was the duty of United States Court of Appeals for the Eleventh Circuit to reverse the Petitioner's conviction. Its failure to do so resulted in a violation of the Petitioner's Due Process rights. In order to assure that Petitioner and all defendants in his position are protected from the unconstitutional law enforcement tactics denounced in United States v. Russell, 411 U.S. at

431-432, this Court should grant certiorari to reverse Petitioner's conviction.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY ANTHONY GIANNI, JOSEPH MIKE GIARDINA, RICHARD LOREN HOLLAND, JAMES ROBERT HAM,

Defendants-Appellants.

NO. 81-5237

United States Court of Appeals, Eleventh Circuit.

June 14, 1982.

Before WISDOM*, RONEY and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

Convicted of conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C.A. §841(a)(1), defendants claim on appeal (1) the evidence was insufficient to convict, (2) the indictment should have been dismissed because of the Government's outrageous

*Honorable John Minor Wisdom, U.S.Circuit Judge for the Fifth Circuit, sitting by designation.

conduct and (3) evidence obtained during warrantless searches of four cars should have been suppressed. Rejecting these arguments, we affirm.

Late in the summer of 1980, the Drug Enforcement Administration instituted an undercover operation called "Operation Doublecross." Approved by the Department of Justice, Operation Doublecross was aimed at apprehending persons involved in financing marijuana purchases. It involved arranging the undercover sale of marijuana previously seized by the DEA in earlier operations. The four defendants were not principals involved in any sale, but were drivers of cars which contained some of this marijuana that had been "sold".

A brief review of the background facts is necessary to show the part played by the defendants. Pursuant to the guidelines of Operation Doublecross, DEA

Agent Fagan contacted Kenneth Craig. Agent Fagan had met Craig roughly a year earlier in the course of an undercover DEA operation during which Craig had represented that he and Robert Karley, whom Agent Fagan had also met in the earlier operation, could supply cocaine or large amounts of marijuana. Craig had previously been present when a sample of marijuana was shown Agent Fagan.

In renewing his contacts with Craig and Karley, Agent Fagan informed them separately by telephone that he had a large quantity of marijuana available for sale. Agent Fagan told Karley to telephone if he knew anyone interested in the marijuana. Karley called Agent Fagan several days later, indicated he had some people, including "Craig's man", interested in the marijuana. A meeting was arranged, and negotiating sessions involving several

other persons not defendants in this case followed. During the course of one session, the undercover DEA agents met David Wainer. Wainer indicated he had buyers then present at the site of the negotiations, a Holiday Inn Motel, ready to deal in large quantities of marijuana. Indicating his desire to protect his buyers, some of whom he said he had worked with for four or five years, Wainer told agents there would be no necessity for them to meet the buyers and that they would be kept from sight. Eventually, an agreement was reached for the sale and transfer of marijuana to Karley, Craig, Wainer and their "people". Undercover agents placed 390 pounds of marijuana in three cars provided by the buyers in return for $95,350.00. Later that same day a second transaction was arranged in which 760 pounds of marijuana was

transferred to the buyers in the same fashion for approximately $186,200.00. Surveilling DEA agents observed both transactions.

The four defendants in this case were arrested while operating the cars loaded with marijuana in the second transaction. Each defendant was the sole occupant of the car he was driving at the time of his arrest.

SUFFICIENCY OF THE EVIDENCE

Defendants contend there was insufficient evidence to support their convictions for conspiring to possess with the intent to distribute marijuana. Conceding the existence of a conspiracy between Karley, Craig and Wainer, defendants argue the evidence is insufficient to show any of them knew of the conspiracy and knowingly and willingly participated in it.

[1,2] When confronted with a claim of insufficient evidence, we must view the evidence in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Rice, 652 F.2d 521, 526 (5th Cir. 1981),[1] making all credibility choices in support of the jury verdict. United States v. Black, 497 F.2d 1039 (5th Cir. 1974). The standard of review is whether a reasonably minded jury must necessarily entertain a reasonable doubt as to the defendants' guilt. United States v. Rodriquez, 654 F.2d 315, 317 (5th Cir. 1981); United States v. Kelley, 630 F.2d 302, 303 (5th Cir. 1980)

1. The Eleventh Circuit, in the en banc decision of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

[3-5] While mere presence or association with other persons involved in a criminal enterprise is not sufficient to prove participation in a conspiracy, United States v. Horton, 646 F.2d 181 (5th Cir. 1981), cert. denied, _____ U.S. _____, 102 S.Ct. 516, ___ L.Ed.2d 388, the essential elements of a conspiracy can be proved by inference from the actions of the actors or by circumstantial evidence. United States v. Conway, 632 F.2d 641, 643 (5th Cir. 1980); United States v. Malatesta, 590 F.2d 1379, 1381 (5th Cir.) cert. denied, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979); United States v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980) (en banc), cert. denied, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981). There is rarely any direct evidence of an agreement to join a criminal conspiracy, so that a defendant's

assent can be inferred from acts furthering the conspiracy's purpose. United States v. Middlebrooks, 618 F.2d 273, 278 (5th Cir.), cert. denied, 449 U.S. 984, 101 S.Ct. 401, 66 L.Ed.2d 246 (1980). The Government is not required to prove knowledge of all the details of the conspiracy on each of its members, provided a defendant's knowledge of the essentials of the conspiracy is established. United States v. Alvarez, 625 F.2d at 1198.

[6] Carefully reviewing the evidence under Glasser and in light of these principles, we hold the evidence was sufficient to sustain the convictions. Pursuant to the agreement and consistent with the pattern employed in a transaction occurring only hours earlier that same day, the Government agents delivered three cars with trunks filled with marijuana to

the Holiday Inn parking lot. The cars had been provided by conspirator Wainer. Three of the defendants emerged simultaneously from the motel, met with Karley in the parking lot, entered the marijuana laden vehicles and drove to another point in the lot where they parked together and were joined by a fourth car driven by the fourth defendant. The evidence amply shows all four defendants engaged in shuffling some marijuana bales to the fourth automobile, departed the lot, and were eventually arrested while operating the cars. Defendant Ham owned two of the cars, defendant Giardina one, and a fourth was owned by defendant Holland's wife. Evidence of these facts, along with conspirator Wainer's alluding to the presence of his "buyers" at the motel, eliminates the possibility that a jury necessarily must have entertained reasonable

doubt of defendants' guilt. The defendants do not deny the existence of a drug conspiracy, and a jury could reasonably conclude from the evidence adduced at trial and the inferences reasonably drawn therefrom that they knew of the conpiracy and knowingly and willingly participated in it. The circumstances belie the argument that defendants did not know their cars contained marijuana.

MOTION TO DISMISS

Arguing the DEA's supplying of the marijuana to the defendants was outrageous conduct constituting a denial of due process, defendants contend the district court erred in refusing to dismiss the indictment.

[7] While both the Supreme Court and our precedents have recognized the possibility that conviction may be overturned where Government involvement in criminal

schemes is so extensive that it may be characterized "outrageous", United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Gray, 626 F.2d 494 (5th Cir. 1980), cert. denied, 450 U.S. 1091, 101 S.Ct. 887, 66 L.Ed.2d 819 (1981), to date it appears that neither the Supreme Court nor the Fifth or Eleventh Circuits has reversed a conviction on that basis. Nevertheless, in evaluating claims that official conduct rose to a constitutionally impermissible level, the cases turn on the totality of the circumstances with no single factor controlling. United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981). Measured under this standard, Government involvement in criminal activity constitutes a due process violation only

where it violates "'fundamental fairness, shocking to the universal cause of justice,'" United States v. Russell, 411 U.S. at 432, 93 S.Ct. at 1643, quoting Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246, 80 S.Ct. 297, 303, 4 L.Ed.2d 268 (1960).

[8] The Supreme Court has held Government infiltration of criminal activity a recognized and permissible means of investigation. United States v. Russell, 411 U.S. at 432, 93 S.Ct. at 1643. That in the course of investigating, Government agents supply or sell illegal drugs or provide other essential services does not necessarily constitute misconduct. Hampton v. United States, 425 U.S. at 489, 96 S.Ct. at 1649; United States v. Gray, 626 F.2d at 498.

[9] The conduct of the Government here does not even approach that demonstrable

level of outrageousness the case law suggests would be necessary for reversal of these defendants' convictions. The evidence reveals that DEA agents simply infiltrated an organization of persons known to be involved in illegal drug trafficking. Informed that large amounts of marijuana could be supplied and they should telephone if interested, Karley and Craig reinitiated contact with Government agents and, along with Wainer, vigorously pursued negotiations culminating in the transactions. All of the defendants were involved with these people without any Government instigation. They never had any contact with Government agents. The availability of defendants and their automobiles to the conspirators to carry out the drug transactions was not the result of any government activity. Even if it could be argued that the Government

activity with Karley, Craig and Wainer was somehow improper, the due process rights of these defendants were not violated.

In any event, under the totality of the circumstances and compared with other cases in which significantly greater police involvment has been held not violative of due process, see United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), the Government's delivering and selling marijuana to willing, experienced buyers for large sums of cash does not constitute outrageous conduct warranting reversal of these criminal convictions.

SUPPRESSION OF EVIDENCE

Defendants claim that because the warrantless searches of the automobiles they were driving did not come within any of the exceptions to the Fourth Amendment's search warrant requirement, the marijuana seized should have been suppressed.

It is clear from the record that after the DEA agents delivered the marijuana, surveilling agents observed the transfer of some bales from the three cars they had loaded to a fourth car, discovered later to be driven by defendant Ham. The agents had expected the marijuana would be driven away in three automobiles, and the intrusion of the fourth was a surprise and raised a concern that some marijuana might be misrouted and lost.

[10] Given the observations of the surveilling agents and the unexpected intrusion of the fourth car, there existed both probable cause and exigent circumstances for the warrantless searches. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); United States v. Gualtney, 581 F.2d 1137 (5th Cir. 1978),

cert. denied, 446 U.S. 907, 101 S.Ct. 1833, 64 L.Ed.2d 259 (1980).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5237

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY ANTHONY GIANNI,
JOSEPH MIKE GIARDINA,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITIONS FOR REHEARING
AUGUST 18, 1982

Before WISDOM*, RONEY and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

PAUL H. RONEY
United States Circuit Judge

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.